Supreme Court U.S.
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No. 01-1740

In the

Supreme Court of the United States

AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioner,

v.

GTE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GTE CORPORATION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Appellee-Respondent states that GTE Corporation is a wholly owned subsidiary of Verizon Communications Inc., which is a publicly held company.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Appellee-Respondent, GTE Corporation ("GTE"), respectfully submits this brief in opposition to the Petition for Writ of Certiorari ("Petition") filed by Appellant-Petitioner, American Motorists Insurance Company ("AMICO").[1]

STATEMENT OF THE CASE

This case involves a straightforward insurance contract dispute, filed in federal court by AMICO under diversity jurisdiction, and litigated and decided exclusively under New York state law. The courts below ordered AMICO to provide liability coverage to GTE for a $4.5 million settlement and for defense costs that GTE paid in connection with a products liability lawsuit styled *Estate of Steven R. Nunn v. GTE Sylvania, Inc., et al.*, No. C-11012 (N.Y. Sup. Ct., Chautauqua County) ("*Nunn*").

No federal question of any kind was presented to or considered by any of the courts below. The interpretation of the insurance contract between GTE and AMICO was determined under New York law. AMICO's sole contention is that the decisions below constitute "a clear departure from current New York law" and further present "[i]mportant questions of law and public policy" that should be decided by this Court. Petition, at 2.

AMICO erroneously contends that an unusual fact that arose in the underlying *Nunn* lawsuit – discovery violations by GTE that led to preclusive sanctions – justifies departure from the normal rules of New York state insurance law. However, two judges of the United States District Court for the Southern District of New York (the Honorable Kimba M. Wood and the Honorable Richard Conway Casey), and a

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[1] AMICO is a Kemper insurance company.

panel of the United States Court of Appeals for the Second Circuit, have determined unanimously that the *Nunn* suit falls squarely within the plain terms of the insurance policy at issue.[2] The District Court and the Second Circuit quite properly declined to depart from well-established New York law, to speculate about what the public policy of the State of New York *should be*, or to rewrite the insurance contract between GTE and AMICO in order to suit AMICO's interests in this case.

AMICO itself does not dispute that the *Nunn* suit is covered under the coverage grant set forth in its policy. AMICO's disclaimer of coverage, which is based on four legal theories, stems solely from the discovery sanctions that were imposed against GTE while litigating the *Nunn* case. Each of these four legal theories was litigated extensively and rejected by the District Court. In affirming the rulings of both District Court judges, which were set forth at length in two memoranda opinions, the Second Circuit stated that AMICO's arguments were analyzed in detail by the District Court and that AMICO did not state valid claims under New York law:

> All of these arguments were analyzed in detail by the district judges. We agree with those judges that, for substantially the reasons they gave, AMICO has not set forth any valid claims under New York law.

See Appendix, at A-3.

After the Second Circuit affirmed, AMICO did not file a petition for a rehearing, nor did it move to stay issuance of the Second Circuit mandate pending AMICO's Petition to this Court. *See* Fed. R. App. P. 40; Fed. R. App. P. 41(b)(2).

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[2] *See* February 25, 2002 Summary Order of the Second Circuit, reprinted as Appendix A to AMICO's Petition; the Honorable Kimba M. Wood's August 4, 1999 Order of the District Court, reprinted as Appendix D to AMICO's Petition; the Honorable Richard Conway Casey's September 25, 2000 Order of the District Court, reprinted as Appendix E to AMICO's Petition (the entire Appendix collectively will be cited as "Appendix, at A-____").

AMICO now asks this Court to use its limited resources to review issues of state contract law and state public policy. Because such issues do not justify this Court's discretionary review, and because the two District Court judges and the three Second Circuit judges correctly applied well-settled principles of New York law, the Petition should be denied.

ARGUMENT

I. AMICO HAS FAILED TO ESTABLISH THAT THIS CASE PRESENTS ANY FACTORS THAT POTENTIALLY WOULD JUSTIFY SUPREME COURT REVIEW.

Supreme Court Rule 10 lists three "compelling reasons" that might justify review by this Court. *See* Sup. Ct. R. 10(a)-(c). In a glaring omission, AMICO does not even mention these three factors, much less attempt to argue that *any* of them apply to this case. AMICO's silence hardly is surprising. Because the District Court and the Second Circuit applied established New York state law to a basic insurance contract dispute, none of the factors that typically justify discretionary Supreme Court review is present: there is no conflict between the Second Circuit's decision and the decision of any other United States court of appeals; the Second Circuit did not decide any "important federal question;" and there is no hint of a departure from normal judicial procedure justifying exercise of this Court's supervisory powers. *See* Sup. Ct. R. 10(a)-(c). The ruling below also has no binding force outside of New York and constitutes only an application of New York law to the provisions of this particular insurance contract. This Court's review therefore is unwarranted.

II. AMICO'S PETITION ONLY RAISES QUESTIONS OF STATE LAW AND STATE PUBLIC POLICY, AND THEREFORE SHOULD BE DENIED.

It is undisputed that the issues raised by AMICO were governed by and resolved under New York state law. The lower courts properly determined that New York principles of insurance law and New York public policy do not allow AMICO to insert a "discovery violation" exclusion into the insurance contract when the language of the policy does not support such a construction.

GTE is not aware of any instance in which this Court has accepted for review a case concerning only the interpretation and application of state insurance law. Indeed, the Court has declined to review many such cases, most or all of which had a far wider impact upon litigants nationwide than this case. *See, e.g., Maryland Cas. Co. v. W.R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993) (New York law), *cert. denied*, 513 U.S. 1052 (1994); *Northern Ins. Co. of New York v. Allied Mut. Ins. Co.*, 955 F.2d 1353 (9th Cir.) (California and Washington law), *cert. denied*, 505 U.S. 1221 (1992); *Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 12 (1st Cir. 1982) (Ohio and Illinois law), *cert. denied*, 460 U.S. 1028 (1983); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981) (District of Columbia law), *cert. denied*, 455 U.S. 1007 (1982); *Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980) (Illinois and New Jersey law), *clarified on reh'g*, 657 F.2d 814 (6th Cir.), *cert. denied*, 454 U.S. 1109 (1981).

This Court also repeatedly has emphasized that it does not review lower federal courts' determinations of state law in diversity cases. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("[O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."). Even where the Court has granted review on *other* issues, it uniformly defers to the United States courts of appeal on issues of state law within their jurisdictional reach. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *Butner v. United States*,

440 U.S. 48, 57-58 (1979). Indeed, this Court has emphasized that, "standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) (citing prior Sup. Ct. R. 17). Accordingly, Supreme Court review is not warranted because this case turns solely upon the interpretation of an insurance contract under New York law.

III. THE LOWER COURTS CORRECTLY DISMISSED EACH OF AMICO'S FOUR CLAIMS.

AMICO does not dispute that it failed to plead the legal elements of its four claims under existing New York law. Therefore, as explained below, the lower courts' unanimous rejection of AMICO's position was a correct application of settled principles of New York law to the terms of the insurance contract at issue in this case. Not only are there no compelling issues that are worthy of this Court's review, the decisions below also undoubtedly are correct as a matter of state law.

A. The District Court and the Second Circuit Properly Rejected AMICO's Argument that GTE Violated the "Cooperation Condition."

AMICO asserts that GTE violated the "Cooperation Condition" of the insurance policy by engaging in discovery violations while defending the underlying *Nunn* lawsuit. However, this argument is belied by the language of the policy itself, and by well-settled New York law setting forth the elements that must be plead in order to establish a breach of this policy condition. *See* Appendix, at A-13 to A-14.

The policy language requires that GTE cooperate *with AMICO*, not with third persons such as the underlying *Nunn* plaintiffs who are not parties to the insurance contract. *See id.* AMICO concedes that it did not and could not allege a

breach of the duty to cooperate *with AMICO*. Therefore, AMICO has not stated a valid claim.

New York law requires that an insurer plead three elements in order to allege a breach of the "Cooperation Condition": (1) the insurer acted diligently in seeking to bring about the policyholder's cooperation; (2) the insurer's efforts were reasonably calculated to obtain the policyholder's cooperation; and (3) the attitude of the policyholder, after its cooperation was sought, was one of "willful and avowed obstruction." *See id.* (citing *Thrasher v. United States Liab. Ins. Co.*, 225 N.E.2d 503, 508 (N.Y. 1967)); *see also New York City Hous. Auth. v. Housing Auth. Risk Retention Group, Inc.*, 203 F.3d 145, 151-52 (2d Cir. 2000) (citing *Thrasher*). As observed by the District Court, it is undisputed that AMICO made no effort to comply with these pleading requirements. *See* Appendix, at A-14. Consequently, there is no merit to AMICO's "Cooperation Condition" argument.

B. The District Court and the Second Circuit Properly Rejected AMICO's Argument that GTE Violated the "Subrogation Condition."

AMICO contends that GTE violated the "Subrogation Condition" of the policy, which states that GTE "shall do nothing, after loss to prejudice [AMICO's] rights" of subrogation against third parties. Petition, at 7. In rejecting this argument, the District Court and the Second Circuit followed well-settled New York law, which requires that an insurer, in order to allege a viable "Subrogation Condition" claim, must plead and establish the existence of a release given by the insured to the allegedly liable third party. *See* Appendix, at A-14 (quoting *Weinberg v. Transamerica Ins. Co.*, 465 N.E.2d 819, 821 (N.Y. 1984)). It is undisputed that AMICO failed to allege this necessary element of its claim. *See id.* at A-14 to A-15.

AMICO contends that the Second Circuit failed to give adequate consideration to the New York Appellate Division's decision in *Shaw v. Bronfman*, 727 N.Y.S.2d 428 (N.Y. App. Div. 2001). However, as AMICO acknowledges, the *Shaw*

case was addressed in the Second Circuit and distinguished by GTE. *See* Petition, at 19. Indeed, although GTE cited *Shaw* in its Second Circuit brief, *see* Brief for Defendant-Appellee, at 33 n.8, AMICO did not cite *Shaw* in any brief that it filed in the Second Circuit, including its reply to GTE's brief, which cited *Shaw*. It is remarkable that AMICO would criticize the Second Circuit's opinion for not expressly citing and rejecting *Shaw*, when AMICO itself failed to mention *Shaw* in its own briefing.[3]

C. The District Court and the Second Circuit Properly Rejected AMICO's "Public Policy" Argument.

AMICO recognizes that New York public policy only bars coverage if the policyholder specifically intended to cause the underlying plaintiff's injuries giving rise to the tort claim. *See Weissmann v. First UNUM Life Ins. Co.*, 44 F. Supp. 2d 512, 519 (S.D.N.Y. 1999). AMICO nonetheless maintains that New York public policy should be changed to bar coverage for settlements paid to underlying plaintiffs where the settlement is preceded by discovery violations in the underlying case.

In spite of AMICO's argument, there is no dispute that GTE's $4.5 million settlement payment was made to the estate of Mr. Nunn as *damages* for his *injuries* and death. There also is no dispute that AMICO's policy covers payments

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[3] Due to the unusual procedural posture in *Shaw*, the first party property insurer actually was an adverse party to the policyholder in the principal tort action against the allegedly liable third party, during which the policyholder committed the discovery violations. *See* 727 N.Y.S.2d at 428. Therefore, the carrier had no opportunity to learn about the violations or prevent them until it was too late. Here, AMICO, a third party liability insurer, was aligned with GTE and had been funding the defense of the *Nunn* litigation for GTE for nearly ten years when the violations occurred. Based upon this distinction, which was discussed at oral argument, the Second Circuit declined to follow *Shaw*. The Second Circuit's decision was a reasonable interpretation of New York law as applied to the facts of this case.

made by GTE as damages for "Bodily Injury [or] . . . Personal Injury . . . arising out of an occurrence anywhere in the world during the policy period." Brief of Defendant-Appellee, at 5 (quoting AMICO Policy, at 1). AMICO cites no authority for the proposition that the settlement payment by GTE falls outside the language of this insuring agreement, and that the payment instead is the equivalent of a sanction or fine paid to a court, merely because the payment was preceded by an adverse pretrial ruling. To the contrary, the very case cited by AMICO holds that New York courts will not rewrite the language of insurance policies to conform to an insurance company's own after-the-fact views of public policy. *See Weissmann*, 44 F. Supp. 2d at 519 (cited at page 23 of AMICO's Petition) (declining to apply public policy considerations to bar coverage where policyholder was alleged to have committed criminal acts but those acts did not contribute to damages to which insurance applied). Accordingly, the District Court and the Second Circuit properly rejected AMICO's public policy argument.

D. The District Court and the Second Circuit Properly Rejected AMICO's "Punitive Damages" Argument.

AMICO's claim that at least part of GTE's $4.5 million settlement payment went towards the payment of punitive damages cannot be reconciled with the undisputed fact that *the underlying Nunn lawsuit never even contained a claim for punitive damages*. *See* Appendix, at A-28 to A-29. Although the plaintiffs' counsel in *Nunn* indicated his intent to amend the complaint to include such a claim, leave to make such an amendment never was granted. *See* Appendix, at A-29. Thus, as observed by both District Court judges, with whom the Second Circuit agreed, AMICO's punitive damages argument is based on pure conjecture. *See* Appendix, at A-16 to A-17, A-29.

AMICO's argument also cannot be reconciled with the undisputed fact that the *Nunn* complaint sought $15 million in compensatory damages, $10.5 million less than GTE ultimately paid in settlement of the claim. *See* Appendix, at

A-23 to A-29. As Judge Casey noted, "[t]his was a 'favorable outcome' for both American Motorists and GTE." Appendix, at A-29. Accordingly, AMICO's punitive damages argument properly was rejected as well.

E. The Second Circuit Was Not Required To Certify AMICO's Appeal to the New York Court of Appeals.

In the Second Circuit, AMICO unsuccessfully sought to have *every one* of its four legal arguments certified to the New York Court of Appeals. The Second Circuit's decision not to certify was well within its broad discretion, as certification of a question of New York state law is purely discretionary. *See* 2d Cir. R. § 0.27 ("[T]his Court *may* certify to the highest court of a state an unsettled and significant question of state law.") (emphasis added). As both the District Court and the Second Circuit recognized, the questions of state law in this case are well settled and compelled rejection of the arguments raised by AMICO. Moreover, AMICO failed to establish that its own after-the-fact views of public policy warranted rewriting the plain language of its insurance policy. Accordingly, the Second Circuit did not commit error by declining to send this matter to the New York courts for yet another round of litigation.

CONCLUSION

AMICO has failed to discuss, much less satisfy, any of the criteria normally used to determine whether Supreme Court review is warranted. AMICO instead has sought review of an insurance contract dispute governed by and decided under New York state law. There are no compelling reasons for review, and AMICO's Petition should be denied.

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